

HB 425 – OPPOSE

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HB 425 OPPOSE
Public Safety - Untraceable Firearms

I am a private attorney practicing on Maryland’s Eastern Shore and the central portion of the State. I write to oppose **HB 425**, which seeks to criminalize constitutionally protected conduct without any benefit, and which unnecessarily burdens law-abiding firearms owners and hobbyists within Maryland.

HB 425 seeks to criminalize – regulate to the point of destroy – conduct that has been legal in the State of Maryland since the time before this jurisdiction was even a state. There is no dispute that Marylanders (and indeed most citizens of this Republic from the various states) have had the legal ability to build/construct/manufacture a firearm for their own private use with no restriction other than such a privately made firearm could not be a “copy” of one banned by statute or possess other certain features (e.g. capable of functioning as a machine gun).

The bill presently before this committee seeks to upend that tradition for no tangible benefit to public safety, in a way that is violative of the United States Constitution, and in a manner that is frankly unenforceable. I will address these issues in turn.

A. Untraceable Firearms are not a pressing public safety concern

The proposed Rule seeks to regulate [out of existence] privately made firearms or “PMFs.” The basis for the desire to so regulate is inherently flawed as it stands on anecdote and then conflates correlation with causation. While the bill under consideration is limited in scope to Maryland, it is appropriate to consider national numbers because: 1) Attorney General Frosh has pointed to nationwide statistics, and 2) Maryland taking action on this issue in a vacuum is beyond pointless (the only practical effect will be to harm law abiding citizens). If we refer to statistics correlated by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (“BATFE”) their data notes that during a five year period (ending 31 December 2020) 23,906 firearms *without serial numbers* “were reported to ATF as having been recovered by law enforcement from potential crime scenes, including 325 homicides or attempted homicides.” However, this number is not limited to PMFs – despite being labeled as “suspected” PMFs – but also includes antique firearms legally manufactured without a serial number and it includes firearms that have had their serial number obliterated by criminals (it is a felony under Federal law to remove a serial number; this is a relevant consideration to one provision of the bill in particular as discussed later).

However, these numbers are, in a word, meaningless (beyond their failure to break down to which were in *fact* PMFs): there is no comparison to historical confiscations over a similar period of time, nor is there any analysis of whether these PMFs (whatever their percentage) were

possessed by persons *already prohibited from owning a firearm*. Indeed, the supporters of this bill rely on an *ipse dixit* assumption that the numbers somehow indicate the existence of a problem. A review of data from BATFE's own publications (available at <https://www.atf.gov/file/130336/download>) indicated that in one (1) year alone – 2017 – a total of Two Hundred Thirty Nine Thousand One Hundred Seventy Five (239,175) firearms were recovered by law enforcement. No other years are presently provided by BATFE, but if we presume this is an “average” number, it would mean that during the same 5-year period cited 1,195,875 firearms were recovered in total, making PMFs accountable for 1.999 per cent of all firearms recovered. Similarly, there are an average of 10,250 homicides by firearm per year in these United States, for a total during the five (5) year time frame mentioned of 51,250; this results in PMFs representing .634 per cent of the total. It is also worth noting that **more people are killed each and every year by “personal weapons (hands, fists, feet, etc.)” than the total of PMFs cited for five (5) years** (see <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/expanded-homicide-data-table-8.xls>).

It is against this backdrop of a “problem,” *vel non*, with PMFs that the supporters of this bill seek to eviscerate a long-standing legal activity of Marylanders going back generations. The expressing wording of the bill under consideration makes it clear that what this bill is in fact attempting to do is quite literally put an end to PMF's. What this bill does not do – and what this bill's supporters cannot explain – is how this bill would actually lessen crime and/or violence in Maryland. The supporters of this bill do not even allege (because they cannot, at least not honestly) that the purported increase in PMFs recovered proximate to crime has caused any *increase* in the amount of crime. The plain reality is that criminals, by their very nature, violate the law. They do not obtain guns legally, as a result they do not possess guns legally, and their use of guns in furtherance of crime already constitutes violation of some of the worst crimes imaginable. The use of a gun during the commission of a crime is universally a felony. Injuring someone with a gun is at minimum felony First Degree Assault, and more likely attempted homicide. Killing someone with a gun results in the potential imposition of the harshest punishment this State allows (life in prison).

B. The bill under consideration violates constitutional rights

At the risk of sounding sarcastic, why would a criminal willing to risk life in prison care in the slightest about the proposed misdemeanor charge? The reality is they would not. Instead, the only population in Maryland this bill would impact (and the only population that would comply) are law-abiding gun owners. It is this population of tax-paying, rule following, upstanding citizens that will be impacted. And the impact this population would feel is extreme. As a best-case scenario, these persons will be forced to pay out \$100 or more to pay for an engraving service. Moreover, that is provided such a service can be found. There are only so many FFLs in Maryland, and even less that are FFL 07 holders with the licensure (presently 163 total) and equipment to inscribe a PMF as this bill seeks.¹ It is reasonably estimated that there exist tens of thousands of PMFs that would fall under the purview of this bill in Maryland. This is juxtaposed

¹ To say nothing of the remaining question about whether an FFL 07 (or importer) can even lawfully engrave a firearm they have not themselves manufactured – and even if they *can*, whether they are willing to do so.

against the reality that turnaround times from licensed gunsmiths for a single service is usually measured in *months*. The end result means the majority of Marylanders will be left with a choice of destroying their property (or surrendering it to the State), or becoming criminals. To be clear, this bill risks taking a wide swath of upstanding citizens and forcing them to become criminals.

Many of the PMFs in questions are built by hobbyists, who build firearms for personal enjoyment. The result of this bill is akin to telling the makers of a kit-car, or homemade motorcycle that their lawful property must be destroyed or otherwise disposed of – or at least it would be akin if there were a constitutional right to own a vehicle. It should not be forgotten that the Second Amendment, as confirmed in the *Heller* case, provides Americans with a fundamental right to keep and bear arms (and this was confirmed in *McDonald* to apply equally to the states by way of the Fourteenth Amendment).

Given that this bill is discussing a fundamental right, the legal standard for review of any infringement on that right is strict scrutiny. For the reasons set forth above regarding the statistically insignificant nature of the purported problem it is clear that goal advanced by this bill cannot meet such a threshold.

It is also worth noting that the required action for existing PMFs – that they be serialized by an FFL – is in many cases impossible to comply with (beyond the logistics of the existing few FFL 07s in Maryland being physically capable of engraving them). Many makers of PMFs engraved their own serial number at the time the PMF was made – in accordance with relevant guidance (notably, not requirement) from BATFE. This means these PMFs already have a serial number – albeit one that is highly unlikely to comply with the particular language of the bill. Then what? It is a felony under Federal law to obliterate that serial number, irrespective of whether it is for the purpose of adding another. This means that the law abiding Marylanders that took the extra and voluntary step of marking their PMF in the hopes it could be recovered if stolen – the exact type of gun owner that the State should seek to reward in this scenario – will have no choice but to destroy or otherwise dispose of their property.

C. The bill is unenforceable

The bill is overly vague and unconstitutionally broad – and, as importantly for practical purposes, unenforceable. A firearm can be assembled from a length of pipe and a handful of screws and sheet metal available at any hardware store with simple hand tools and a few hours of work (see, for example, “The DIY Sten Gun” https://www.herohog.com/GunBuilds/Practical_Scrap_Metal_Small_Arms_Vol.03-The_DIY_STEN_Gun.pdf). Would the supporters of this bill expect Home Depot to serialize every piece of mild steel pipe and obtain a Federal Firearms License?

If we assume the answer is no, then we return to the only plausible scenario being that the supporters of this bill intend to end the right of Marylanders to construct their own firearms. The destruction of such a freedom provides no benefit to Maryland or society as demonstrated the statistical insignificance of PMFs shown above. It does however accomplish two things: 1) it destroys a significant number of small businesses and erases many manufacturing jobs creating American-made products for domestic consumption; and 2) it ends a 250 year American and

Maryland tradition – enjoyed by millions of law-abiding hobbyists – of building a firearm for personal use. The people building a Polymer80 “Glock” type pistol or an AR-15 (America’s most popular rifle) are tax-paying, law-abiding citizens enjoying a past time shared by their ancestors from ten generations; to say nothing of the hobbyists constructing a more complicated firearm clone or even an original design.

A prohibited person that builds their own firearm is already knowingly committing a crime irrespective of any change in existing law or regulation. If the PMFs magically disappeared tomorrow the exceptionally rare criminal that might today obtain a firearm [illegally] by building their own, will instead obtain a firearm the way his “colleagues” do (and have always done): on the black market (or perhaps build a “DIY Sten gun” or one of dozens of other designs requiring only common materials it is impossible to regulate). But we are not talking about the possibility of PMFs disappearing from the nation, only from Maryland. And, even if Maryland PMFs magically disappeared tomorrow, in addition to the other options just mentioned, a person already intent on breaking the law can simply drive one hour or less to one of the surrounding jurisdictions and buy the materials this bill seeks to ban. The only individuals impacted in any measurable manner will be the tens of thousands of law-abiding Maryland hobbyists, dozens if not hundreds of small businesses, and attendant jobs.

To the extent the Maryland General Assembly wishes to actually tackle the problem of violent crime in urban areas (the jurisdictions cited by the supporters of this bill) I suggest the legislature look to:

- a) Strengthen the sentencing guidelines as they pertain to the use of a firearm during a criminal act and/or for criminals found possessing narcotics at the same time;
- b) Make statistics for sentencing widely available, for both judges and prosecutors, so that voters can see which judicial officials are being aggressive with violent and/or firearm offenses, and which are creating an atmosphere where criminals feel emboldened;
- c) Make improvements to the education system in the urban areas the bill’s sponsors rely upon and provide actual support for students and incentives to students and parents to see children graduate (let’s be honest, this is in large part a generational problem that will require ongoing efforts to correct);
- d) Reinstigate actual punishments for students who engage in violence or are caught with weapons at school, and empower teachers and administrators to actually punish these students;
- e) I know this suggestion may fall on deaf ears, but consider amending gun laws and the law of self-defense in Maryland to make it *easier* for a law-abiding person to carry a gun, and to remove questions about a duty to retreat. The plain reality is the criminals in question know that their victims are disarmed. Their victims have been disarmed by prior laws passed in this State – and the reality that these criminals have no reason to fear their victims only emboldens the criminal element. As the late Lt. Col. Jeff Cooper noted, “If violent crime is to be curbed, it is only the intended victim who can do it. The felon does not fear the police, and he fears neither judge nor jury. Therefore what he must be taught to fear is his victim.”

However, the bill currently under consideration will have zero positive impact on crime in Maryland. The only impact this bill will have is to harm law-abiding Marylanders by costing them money, the loss of property, or both. More troubling, this bill will necessarily cause some formerly law-abiding citizens to become criminals when forced to choose between their [formerly lawful] property and a [then] law that they cannot comply with.²

Respectfully Submitted,

/s/

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² I will note also that this bill *will* cost Maryland financially. If passed, especially in anything resembling its current form, this bill will be challenged in the courts. I will venture to say that it will not only be challenged, but those challenges will be ultimately successful.